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Office-Supreme Court, U.S.
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In The

Supreme Court of The United States

October 1965 Term

No. 732

In the Matter of

ARNOLD SCHILDHAUS, an Attorney,

Appellant,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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Martin Lutz Appellate Printers, Inc.
New York • Philadelphia • Newark • New Brunswick

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JURISDICTIONAL STATEMENT

Arnold Schildhaus, above named, has appealed to this Court by a Notice of Appeal dated September 15, 1965 and filed in the court possessing the record, the Appellate Division, First Department, on September 15, 1965, from a final order entered in the office of the Clerk of the Court of Appeals on July 9, 1965 which affirmed an order disbarring appellant as an attorney.

Appellant submits this statement to show the Supreme Court of the United States that it has jurisdiction, and that substantial and important federal constitutional questions are presented respecting federal due process.

(a) The Opinion Below

The opinion of the Appellate Division, First Department, has been officially reported as 23 A.D.2d 152. A copy is annexed hereto, and is Appendix A. The Court of Appeals affirmed without opinion.

(b) Jurisdiction

The Jurisdiction of this Court to review this case by direct appeal is invoked under 28 U.S.C.A. section 1257 (2).

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, sustains the jurisdiction of this Court on direct appeal.

The validity of a State statute has been held to have been sustained within the meaning of section 1257 (2) where the State courts uphold the constitutionality of a statute as administered against a charge that the State statute as administered is invalid on federal grounds (Dahnke-Walker-Milling Co. v. Bondurant, 257 U.S. 282, 290).

(c) Statutes Involved

Section 90 of the Judiciary Law of the State of New York may be found in McKinney's Consolidated Laws of New York Annotated, Book 29. A copy of the section can be found in Appendix B, hereto.

(d) Questions Presented For Review

1. Does Cohen v. Hurley (366 U.S. 117) sanction the use in disbarment proceedings of the inquisition without charge or without relevance to brought charges

until the forcing of answers in a general inquiry of the attorney's legal, business and private life uncovers something; and these admissions form the basis for a petition and proceeding seeking the disbarment of the attorney and his ultimate disbarment.

2. Does Cohen v. Hurley, supra, repeal settled New York law that "before a decision can be reached whether to prosecute at all" "there must be" "a preliminary inquiry" (Ch. J. Cardozo in People ex rel. Karlin v. Culkin, 248 N.Y. 465, 477-478); by sanctioning the general inquiry without charge or the inquiry without relevance to the charges brought until the disciplinary procedure is merely a mechanical operation in which the inquisition continues until something is discovered and thus in these inquisitions disbarment is inevitable.

3. Where, as in this case now before this Court, is there procedural due process under the Fourteenth Amendment where the respondent swears to a petition after being given repeated notice of its falsity and with knowledge that it is swearing to a false petition; without the preliminary inquiry required by New York law which of course would have demonstrated the falsity of the petition; and this false petition is then presented to the Appellate Division, First Department; with the purpose admitted in the affidavit of appellee herein of securing a hearing so that a variation of the inquisition ex officio under New York's interpretation of Cohen v. Hurley, supra, may possibly through the forced answers of appellant uncover something that will form the basis for the disbarment of appellant.

4. After respondent admitted the falsity of its first petition, again, without the preliminary inquiry required by New York law, a second petition was sworn to on October 5, 1961, even though the appellee knew that the petition was inaccurate, false and perjured in 14 of its 15 charges for the purpose stated in its affidavit of October 20, 1961: "While the accuracy of the convictions may be questioned on the grounds alleged in respondent's (appellant here) affidavit; these raise questions to be determined by the Referee after a hearing." Both petitions had alleged various convictions of the Multiple Dwelling Law of the State of New York as requiring the disbarment of appellant. All except one on appeal had been reversed or writs of habeas corpus sustained. Each reversal and each sustained writ of habeas corpus had received wide publicity. Appellee knew that all the convictions except one had been reversed and had repeatedly acknowledge this fact; do false and perjured petitions whose purpose is to serve as the foundation for a Cohen v. Hurley, supra, type of inquisition violate the procedural due process clause of the Fourteenth Amendment.

5. Where the Referee had refused an offer of proof and had even refused to allow it to be read in the Record; appellant had attempted to prove the relationship of the disbarment proceedings with the facts that appellant was the attorney for real estate owners and their spokesman in the various associations of such real estate and property owners. As their spokesman, he had been repeatedly imprisoned falsely. He had been imprisoned for the same crime even after writs of habeas corpus have been sustained. Even after the Court of Appeals had re-

versed an order of the Appellate Division reversing an order of the Supreme Court sustaining a writ of habeas corpus, he was imprisoned for the same crime. Where Appellate courts reversed, appellant was rearrested for the same crime after the reversal. Where stays were granted by the Supreme Court prohibiting the imprisonment of appellant, appellant had been imprisoned. An incredible story of the flouting of laws, writs, stays, reversals and even federal orders could be told. Clients were warned not to hire him or feel the weight of persecution and prosecution. Bank accounts were tied up illegally. Members of his family held as hostages. Appellant was reported to the Treasury Department as a tax violator. The list is endless.

Appellant claimed when all these illegal and unconstitutional acts had failed, that the disbarment was the last attempt to remove the spokesman for the real estate associations especially in view of the fact that press, radio and television had given wide publicity to his various reversals, writs and judgments for false arrest and illegal imprisonment. The Referee rejected the proof and refused an offer of proof because he said the proof offered was irrelevant and immaterial saying: "I don't pay any attention to it. I don't receive the proof." Yet, for innumerable pages of testimony in the record, the Referee cross examined appellant in an attempt to find a charge on which appellant could be disbarred even though such cross examination had no relevance or materiality to the charges. Is Cohen v. Hurley, supra, a one way street in which the lawyer is not protected against arbitrary action and procedural irregularities?

6. Where papers are barred: 1) because of the Statute of Frauds (Section 33 c of the Personal Property Law of the State of New York); 2) by the terms of section 103 of the New York State Banking Laws; 3) by the terms of the paper itself and the terms of a loan application to which the paper is sought to be integrated; 4) by the requirement that a promise to pay the debt of another corporation must be signed by the guarantor; 5) by the Parole Evidence Rule; and, if the appellee by an elaborate fraud manufactures three applications for loans by inserting in each of three application for loans 2 papers printed on both sides which papers are barred for the five reasons heretofore given; and of to use the words of the Referee in his report: "It is in these (inserted papers) that respondent (appellant here) made the statements which petitioner (appellee here) charges are false." Appellant is disbarred because of the alleged false statements in these "inserted" sheets. Is the fraudulent manufacture of exhibits a violation of procedural due process.

7. The Appellate Division, First Department, in the opinion appended to this Statement admits the fraud but states in its words of the "sheets inserted in the loan application" * * * "regardless of whether the writing be signed or unsigned" * * * it is a "technical defense" and "sophistry" which "establish a superficial justification." Is the fraudulent manufacture of exhibits which are the sole and only basis of the charge of disbarment by "sheets inserted in the loan application" by a fraud involving herculean effort and cunning to give the impression that these inserted sheets are part of three signed loan applications and not barred for the reasons heretofore stated in Question 6 a "technical defense" or "sophis-

try" which "establish a superficial justification" or is it a violation of the Fourteenth Amendment of the United States Constitution.

8. Where the same Appellate Division in Matter of Shufer (12 A.D. 2nd 208, 213 N.Y.) had declared only a short time before that competent legal evidence is necessary to disbar an attorney; can the Appellate Division in all cases insist on competent legal evidence but in this waive the requirement especially as in this case where there is no competent legal evidence (not some, but none) and disbar the attorney without any competent legal evidence.

9. Is it due process of law to disbar an attorney by these steps. Before the charge is brought or approved introduce minutes, without a foundation that they are an accurate transcription of court proceedings and in violation of New York Law which spells out the foundation necessary before they can be introduced in evidence, and despite objection that the minutes are false and inaccurate and despite the requirement in New York law that since all the witnesses are available and within the control of appellee, they should be produced for cross-examination. The minutes are introduced over the objection that they have no relevancy or materiality to the charges up to that time presented and approved. Appellant is cross-examined regarding these irrelevant, immaterial and incompetent minutes. As a result of the cross-examination, two charges are then brought alleging misstatements in these minutes. But, after the charge is presented and approved, the minutes are never introduced in evidence to prevent cross-examination. The statements in the minutes are then assigned as the reason for disbarring appellant.

In the other charge, photo-copies of loan applications containing "unsigned" "inserted sheets" are introduced even though they are not relevant or material to the charges as they then stood. Appellant is then cross-examined as to the "unsigned" "inserted sheets." The answers given at the cross-examination then become the basis for a petition presented and approved. To prevent detection of the *fraud and to prevent cross-examination at no time* are the originals ever offered in evidence and after the charge is approved by the Appellate Division even the fraudulent photocopies are never introduced in evidence.

10. Where the Legislature of the State of New York has declared: "Such a violation under this subdivision shall not be a crime and the penalty or punishment imposed therefore shall not be deemed for any purpose a penal or criminal penalty or punishment and shall not impose any disability upon or affect or impair the credibility as a witness or otherwise, of any person convicted thereof."

Where an attorney is accused of being convicted of an offense under this subdivision (Multiple Dwelling Law, section 304 (1a) of the State of New York); is it a denial of due process for the Appellate Division to legislate in denying motions to dismiss the disbarment proceedings on the grounds stated by the Legislature. Has not the Appellate Division, in this case, gone beyond Constitutional limits in being legislator, prosecutor, judge and jury. (See, Bonham's Case, 8 Coke Rep. 116).

11. To disbar appellant, the proof related to events long forgotten. The inquisition dealt with

applications for loans made in 1953; is it equal protection under the Fourteenth Amendment to deny only lawyers and murderers a Statute of Limitations conceding it is not part of procedural due process.

12. In New York, every other person or profession even murderers are entitled to at least one appeal on the facts; is it equal protection of the law to deny *even one appeal to* lawyers alone.

13. The fraud on the court assigned as the main reason for the disbarment is the claim that he told the Court in substituting a corporate defendant for himself in the trial of an offense under section 304(1a) of the Multiple Dwelling Law (heretofore quoted) that a Unity Estates Inc. was the owner of the building when in fact Mae Ed Corp. was the owner. This is not the case of an unconvicted defendant who is substituted in place of a multiple offender. The reverse is true; Mae Ed Corp. had never been convicted while according to the record Unity Estates Inc. had been convicted at least four times. What conceivable difference does it make that the wrong corporation was given a suspended sentence where the maximum fine is $50 without any imprisonment permitted. Where appellant had been imprisoned under this section he secured a judgment from a jury of $9,000 which was reduced by this Appellate Division to $6,000. Yet this is the main reason assigned for the disbarment. Taking all the facts recited in these questions and in the statement, could not a reasonable man conclude that appellant would have been disbarred if he spit on the sidewalk.

FACTS

Appellant is the attorney for various real estate associations and many owners of real estate. He has been known for very many years for his defense of anyone who has been deprived of due process of law. These have included Bowery Bums, the Family Court victims, the lawyer and a host of others. Many of his cases have for many years been given widespread publicity in the press, radio and television.

For many years, it has been a guaranty that careful consideration would be given a case if appellant was hired as the attorney. Whether it was the City Magistrates' Court of the City of New York or the Appellate Division, appellant was respected and feared. Over many of these years, his was the only voice protesting various unconstitutional procedures. It has been no secret in the profession that for the last twenty years many would have liked to still his voice.

Over these years, appellant has been repeatedly arrested and imprisoned. Where no one has ever been arrested, he was; for example, when he parked his car at a meter for more than an hour, he was arrested and imprisoned (Schildhaus v. City of New York, 7 Misc. 2nd [N.Y.] 859, modified 10 A.D. 2nd 566, aff'd, 8 N.Y. 2nd 1108). To recite the facts of all the arrests and imprisonments would take a volume; there were more than forty of them. A fair sampling of them will be given.

POINT ONE

This court could logically conclude and infer that from the more than forty illegal arrests and imprisonments, the continuous and continual disregard of sustained writs of habeas corpus: the jailings after sentences were reversed: the jailings despite stays issued by the Supreme Court, the Appellate Division and the Court of Appeals: the illegal financial pressures: the holding of members of his family as hostages: and other acts were part of a pattern to discourage appellant from representing a minority.

One of the exhibits which was marked but not received by the Referee was an offer of proof detailing all these illegal arrests and false imprisonments. Appellant had claimed that the disbarment proceeding was motivated by the desire to remove the attorney for the real estate associations and real estate owners. To prove that fact, he attempted to show in the hearings various proofs of that charge. The Referee refused to hear them; and when an offer of proof was made he refused it saying: "I don't pay any attention to it, I don't receive the proof." Space forbids the reproduction of the offer of proof, but a fair sampling will be given.

In one case, appellant was arrested. The Magistrate refused to permit him to put in a defense. He was given a 30 day sentence for violating the Multiple Dwelling Law as an offense even though the maximum sentence is a $50 fine. Even if the fine is not paid, the law does not permit imprisonment. After serving 5 days in jail, he sued out a writ of habeas corpus

which was sustained by the Supreme Court. Moreover, the Appellate Court to which the judgment of conviction was taken, reversed the conviction. Despite the sustained writ of habeas corpus, the reversal of the judgment of conviction, appellant was rearrested and reimprisoned for the same offense. To relate all the facts would take too much space. He again secured his release; sued the City of New York, and a Judge and Jury gave him $9,000. The Appellate Division reduced it to $6000.. The Court of Appeals affirmed. (Schildhaus v. City of New York, 7 Misc. 2nd 859, 10 A.D. 2nd 566; aff'd,8 N.Y. 2nd 1108).

In another case, despite the order of reversal of the Court of Appeals reversing the order of the Appellate Division which had reversed an order sustaining a writ of habeas corpus; appellant was rearrested and imprisoned despite the order of the Court of Appeals sustaining the writ of habeas corpus. Appellant sued the City of New York, a Judge and Jury awarded him $12,000. The Appellate Division reversed; directing a verdict for the defendant. That is presently on appeal in the Court of Appeals.

In one case, appellant was arrested, tried and convicted and imprisoned for 38 days despite: 1. a sustained writ of habeas corpus; 2. a stay from the Supreme Court prohibiting the imprisonment; 3. the fact that the maximum penalty was a $50 fine with no provision in the law enforcing the payment of the fine by imprisonment. Appellant sued the City of New York; a Judge and Jury awarded him $9,000. That judgment was affirmed by the Appellate Division (Schildhaus v. City of New York, 18 A.D. 2nd 791).

In one absolutely incredible case, despite a reversal of the conviction, a sustained writ of habeas corpus, a stay from the then Presiding Justice of the Appellate Division; appellant was imprisoned and could not secure his release in the State Courts and stayed in jail until the late Circuit Court Judge Learned Hand ordered his release, terming all the proceedings a "disgrace." A suit against the City of New York for false arrest is now almost ready for trial.

Clients were warned not to hire him. His bank accounts were levied on. Economic pressures of many kinds were exerted against him. Appellant was reported to the Internal Revenue Department as a tax violator. It took two reversals by the Circuit Court of Appeals for the Second Circuit to extricate appellant from these troubles. His sister was held as a hostage for him. The offer of proof contains a fuller description of all of these facts.

POINT TWO

Petitions were sworn to with knowledge of their falsity in order to conduct an inquisition "ex officio" under New York's interpretation of Cohen v. Hurley (366 U.S. 117).

There is a great deal of evidence in the record that the disbarment proceedings were instigated by employees of the City of New York. Appellant had been reported to the Bronx Bar Association in which borough of the City of New York, appellant had his office. They investigated, found no merit in the complaint, and refused to recommend that charges be brought.

Employees of the City of New York are members of the Association of the Bar of the City of New York and members of its committees. Despite its name, the Association is primarily an association of attorneys having their offices in New York County. The Association was furnished transcripts of records showing appellant had been convicted of violating the Multiple Dwelling Law some 9 times. Whereas the Bronx Bar Association made an investigation and found that each of the convictions had either been reversed or writs of habeas corpus sustained or were on appeal; the Association of the Bar without investigating the facts had two of its officers swear to a petition that appellant had been convicted of violating the Multiple Dwelling Law fifteen times even though its own records showed only nine convictions and despite the fact that a reasonable man might presume that some of the convictions had been appealed.

Moreover, when an employee of the Bar Association talked to appellant, appellant on two occasions notified them that each of the convictions had either been reversed or writs of habeas corpus sustained or were then on appeal. The Bar Association took the position that proof of these facts must be furnished by the attorney to them. At that time, appellant was co-counsel with Herbert S. Siegal in People v. Spano which eventually went to this Court as Spano v. New York (360 U.S. 315) and did not have the time to get the necessary transcripts.

Appellant relied on the fact that always before proceedings are brought there is a preliminary inquiry. This preliminary inquiry is required by New York law (Ch. J. Cardozo in Peo. ex rel. Karlin

v. Culkin, 248 N.Y. 465, 477-478). He relied on the fact that if a preliminary inquiry were held, there could be no petition. At the hearing before the Referee, appellee conceded: "I will concede that we received incorrect certificates of convictions and, therefore our allegations based on those were incorrect." Two officers swore to the petition after repeated notice of its falsity. The testimony before the Referee was false in that of the fifteen convictions sworn to based on the certificates of convictions (these are exhibits in this case) only nine convictions were actually shown. And surely, a reasonable man, even without repeated notice, would presume that some of the convictions had been appealed especially since the press, radio and television had repeatedly carried stories of the reversals and of appellant's judgments for false arrest.

Whatever excuses might be offered for the first petition, there could be none for the second petition. Despite all the notice here alleged and admitted by appellee, two officers of the Association of the Bar swore to a second petition claiming fourteen convictions for violation of the Multiple Dwelling Law. Thirteen of the fourteen were false. Again, there was no preliminary inquiry required by New York law. With knowledge of its falsity, two officers of the Association for the second time swore falsely. The question is why? The answer is in the affidavit of the attorney for the appellee of October 21, 1961 opposing a motion to dismiss the second petition for perjury; it states in part: "While the accuracy of these convictions may be questioned on the grounds alleged in respondent's (appellant here) affidavit, these raise questions to be determined by the Referee after a hearing."

New York courts have interpreted Cohen v. Hurley, 366 U.S. 117 as sanctioning the inquisition without charge or where charges are brought without relevance to the brought charges. The inquisition that is made covers every aspect of the attorney's personal and business life. He is forced and required to bring in all his records. Failure to bring them means automatic disbarment. Failure to answer all questions is called non-cooperation and means automatic disbarment. His personal and business life are inquired into until something damaging is discovered. The disciplinary proceeding is merely a mechanical operation in which the inquisition continues until something is discovered and thus in these inquisitions disbarment is inevitable. For who is without sin?

In this case, most of the inquisition was conducted by the Referee. Appellant was in the strange position that if he objected to the irrelevant and immaterial questions of the Referee, he would antagonize him. He risked it and antagonized the Referee. It was as a result of the questions of the Referee that Charges IV, V and VI were brought. The other charges were dismissed and appellant disbarred on these charges.

To protect his record, appellant brought motion after motion asking dismissal of the petitions for perjury. To further protect the record, appellant brought an action for a declaratory judgment. The first and second actions for a declaratory judgment were dismissed in the exercise of discretion. Declaratory judgment is a discretionary remedy in New York. The first he appealed to the Court of Appeals which dismissed on the ground that the order did not finally determine the proceedings (Schildhaus v. Association of the Bar, 11 N.Y. 2nd 644.

POINT THREE

The Appellate Division, in its opinion, admits the fraudulent manufacture of exhibits by inserting unsigned sheets in three exhibits which by law must be signed by an involved fraud and using these fraudulently manufactured exhibits as the foundation for the disbarment in this case.

To make sure that appellant was disbarred, exhibits were fraudulently manufactured. In 1953, 1955 and 1956, corporations of which appellant was President had made inquiries for loans to a Royal State Bank of New York. Two of the loans were never taken by the corporation due to changing conditions which did away with the need for the loan. The third loan was made and paid.

These inquiries for loans had been made about 10 years before the hearings in this case. At the hearings, appellant was shown three photo copies of applications for loans. Objection to them was overruled by the Referee. These photocopies consisted of three separate applications for loans of four pages each. Each of the pages was photocopied by a Thermo-Fax process, so that each page was printed front and back, the four pages were stapled together with wire staples. Each of the applications for a loan was signed on the last page. They looked genuine. When they were introduced, appellant was not given an opportunity to closely examine the exhibits but was hurried by the Referee. Even though the only charge against appellant, at that time, was violations of the Multiple Dwelling Law, and even though these were photo copies and not originals, appellant's objections were overruled. After they were received in evidence,

appellant was given a long cross-examination by the Referee. Included in the cross-examination were questions regarding another corporation whose unsigned statement had been inserted in the loan application of the corporation seeking the loan. These questions and the answers given as to the other corporation form one of the reasons assigned for the disbarment. The original were never introduced in evidence. For a year and half, appellant sought to examine the originals. When appellant pressed appellee he was furnished a false photo copy of the exhibits introduced in evidence. The Royal State Bank of New York claimed it did not have the originals. About a year and a half after the photo copies were introduced in evidence, an employee of the Bank had been called to testify as to the usual practices of the Royal State Bank; he produced the originals; and appellant for the first time saw the originals and he noticed certain discrepancies. Even after he called the attention of the Referee to the discrepancies, the originals were never introduced in evidence.

Appellant conducted an investigation, and discovered the fraud. The originals of the applications for loans were printed in a four page book on salmon colored stock which was folded in the center. The sheets that had been inserted in the center were two one page sheets printed on both sides of the sheet on white stock. Both the applications for loans and the inserted sheets provided that the whole contract was on the salmon colored applications for loans unless the white sheets were signed and made part of the loan application. This is required by the codification of the Statute of Frauds to be found in the Personal Property Law of the State of New York (section 33 c).

Much ingenuity was required to manufacture these unsigned sheets into signed sheets. The first problem was the difference in the color of the paper. To overcome that, photo copies were made. Next, by inserting the unsigned sheets in the middle and the signed sheet on the last page, the impression was given that all the sheets were part of three separate loan applications signed at the end of each.

To prevent discovery, it was important not to introduce the originals in evidence. At no time were they ever introduced.

The materiality of the insertions becomes clear when the Referee in denying appellant's motion to strike after the fraud was discovered, said: "It is in these (the inserted sheets) that respondent (appellant here) made the statements which petitioner (appellee here) charges are false."

Not one word was said by anyone of the insertion of the sheets until appellant discovered the fraud. The Referee in this report (p. 36) says: "he was not tricked" the papers were shown to him "all clipped together" just as they were produced by the bank; he examined them, he interrogated about them, and reference was distinctly made in the questioning including his own to the fact that the inserted pages had not been separately signed; and no one said or suggested that they had been, and it was obvious on their face, that they had not been." This is an absolute misstatement of fact. When appellant discovered the fraud, and was absolutely sure of each fact, and all had been nailed down; he, in the hearing of March 20, 1964 made the charge of fraud. From page 606 of the minutes of the hearing before the

Referee where the Referee said: "You didn't object on the ground that there was any impropriety in these papers. You objected on a question of materiality and relevancy. Now, this is the first time I hear anything to the effect this was a fraudulent document that was foisted on me and I don't believe it now."

It took almost a half hour, twenty-nine pages of testimony until the appellee explained the fraud to him (p. 635 of minutes of hearing):

> "Mr. Franek: If you take Exhibit 15, as an example, there are a number of sheets which comprise Exhibit 15, one of those sheets is signed, two of those sheets, I'm not sure about the number of sheets are not signed, but admittedly in Mr. Schildhaus' handwriting. He is claiming that the two that aren't signed are inadmissible."

The Appellate Division in its opinion discussing the fraud says:

> "that respondent (appellant here) argument for the inadmissibility of sheets inserted in the loan applications demonstrate a woeful disregard of the obligation which rests upon every lawyer to act fairly and honorably, irrespective of whether it be by word of mouth or in writing, and, if the latter, regardless of whether the writing be signed or unsigned." (Underlining appellant's.)

It was appellee's claim that the sheets were photo copied in the same order that they were received from the bank. This explanation overlooks that in

two of the applications, unsigned statements of other corporations are included, and it is in these unsigned statements of other corporations that many of the important alleged misstatements are made. This corporation while it may have applied for a loan, never made a loan with this bank. Without these inserted sheets of another corporation, there would have been no disbarment. It does not explain the failure to introduce the originals which by the best evidence rule in New York are the only competent evidence. It does not explain the failure of the appellee to inform anyone of these facts even after the fraud was discovered. It does not explaint that even after the charge was made, and even though the alleged misstatements were on these "inserted sheets" not even photo copies were introduced after the charge was made; so that there is no evidence in the record after the petition was presented and approved by the Appellate Division, only before. It does not explain the furnishing of photocopies by appellee to appellant that were false.

These inserted sheets were barred because by their terms they were required to be signed. By the terms of the loan application and these sheets before these sheets could be integrated in the loan application both provided that they must be signed. This is codified in the New York Personal Property Law, section 33 c. By the Parole Evidence Rule they could not be introduced. Four of the inserted sheets dealt with the promise to pay the debt of another corporation which by the Statute of Frauds must be signed by the guarantor. The New York State Banking Law required these "inserted sheets" to be signed. Contract law required these sheets to be signed. The Appellate Division says of all of this it is a "technical defense" and "sophistry."

The question may be fairly asked does the obligation to act fairly and honorably belong only to attorneys and not courts. Does a court act fairly and honorably when it permits the knowing and admitted use of false and perjured petitions and the use of forged manufactured exhibits (See, Napue v. Illinois, 360 U.S. 264, 269).

POINT FOUR

The manner in which the Appellate Division administers section 90 of the judiciary law of the State of New York violates the due process clause of the Fourteenth Amendment.

It is impossible to understand the severity of the sentence in view of the trivia of which appellant was found guilty of, unless some more background is given. Appellant for more than 20 years has attacked the manner in which Section 90 of the Judiciary Law has been administered. Each year he saw the Appellate Division claiming more powers and exercising those powers in disciplinary proceedings. More attorneys are disbarred in the City of New York according to the American Bar Association each year than in the rest of the United States combined. More lawyers are disbarred in each of the last few years than in the entire state from the period from 1777 to 1927. In a study made by appellant, see Brief in Court of Appeals, it was his conclusion:

> "In England, the Court of Justice are relieved from the unpleasant duty of disbarring advocates in consequence of the power of calling to the Bar and disbarring have been in very remote times delegated to the Inns of Court"

(By Petition from Antigua (Privy Council), 1 Knapp 267).

Appellant found about 60 disbarments in a 600 year period. These disbarments usually reflected the despotism of the times. This is not the place to give detailed proof of his conclusions; yet, it must be admitted that bad historical research (such as the undelivered opinion of Wilmot, J. in contempt cases had in the law of contempt) so, the erroneous impression that common law courts exercised a supervisory power over barristers and attorneys has had a tremendous impact on the present concept of the relation of courts and attorneys.

In New York, this has manifested itself in the disregard of the constitutional rights of attorneys under the fiction that taking away a man's livelihood, disgracing him, and throwing him into the business of making a living without training is not punishment. The first step usually is a request to the lawyer to bring all his records, bank statements, income tax records and the records of every case in his office; if he refuses, he is disbarred (Matter of Friedman, 375 U.S. 10). The attorney is then called to answer questions even though there is no charge. The questions may go back to long forgotten events. In this case, the Referee questioned appellant about an unsigned piece of paper made in 1953 or earlier. If he does not answer, he will be disbarred (Cohen v. Hurley, 366 U.S. 117). The questions as in this case need not be material or relevant. Nor is the lawyer informed of the charge. It is only when, as in this case, something is discovered will a charge be made. In this case, false and perjured petitions are permitted. In this case, the use of forged,

manufactured exhibits is sanctioned so that cross-examination of appellant may become the basis for a charge. The obligation to act fairly and honorably is restricted to attorneys. Competent legal evidence, as in this case, is not necessary; or if it is usually necessary in this case procedural regularity is disregarded. There is in this case no competent legal evidence of the charges.

While New York law requires a preliminary inquiry before a petition can be presented to the Appellate Division (Matter of H, 87 N.Y. 521; Anonymous, 22 Wend. 653; Matter of Eldridge, 82 N.Y. 161; People ex rel. Karlin v. Culkin, 248 N.Y. 465); in this case no preliminary inquiry was held to any of the petitions. Under New York law, the Appellate Division acquires no jurisdiction unless satisfied of the probable truth of the petition (Matter of Brewster, 19 Hun 109, 110; Matter of H, 87 N.Y. 521). In this case, even after respondent admitted the falsity of its petition, a petition was approved.

Under procedures now used in New York, once the inquiry is started, disbarment is merely a mechanical procedure in which the ultimate disbarment of the attorney becomes inevitable.

Appellant objected to the fact that the Appellate Division is both prosecutor, judge and jury and makes its own laws as to why it will disbar an attorney. There is no appeal. The appeal as to law now given is illusory (See, Cohen & Karger, Powers of the Court of Appeals, p. 452 where the authorities are collected). The result is a subservient bar who must cater to a new prerogative; the prerogative of the Appellate Division.

POINT FIVE

There is no competent legal evidence of any of the charges sustained.

As a result of questioning by the Referee, three new charges were presented and approved by the Appellate Division. Two charges were presented and approved by the Appellate Division. Two charges alleged professional misconduct in that at the trial of two offenses (violations of the Multiple Dwelling Law), appellant had misrepresented to the Court that Unity Estates, Inc., was the owner of an apartment house when in fact Mae Ed Corp. was the owner. This violation by definition in New York is not a crime. Nor is this the case of the much convicted defendant presenting someone who has never been convicted. The reverse is true in this case.

Proof of the misrepresentation is to be found in minutes of proceedings in the City Magistrates' Court of the City of New York. These minutes were introduced over objection without testimony by anyone that they were an accurate transcription of the proceedings. It contained a certification by the stenographer, but no proof was ever offered that he actually certified the minutes or that these were the minutes of this proceeding.

Appellant denied their accuracy. Each of the witnesses to the alleged misrepresentation were alive, available and in the control of appellee. Despite a promise by appellee to produce the stenographer who was in their control, he was never produced. Nor were any of the other witnesses in their control ever produced. The usual inference is that the failure to produce witnesses within the control of a party is that if they had been produced they would have testified that the minutes were not accurate.

Some six months after these minutes were received in evidence over objection, two charges were brought of the alleged misrepresentation in the "minutes." After the charge was brought, the only proof of the alleged misstatements of fact, the "minutes" were never introduced to prevent cross-examination.

These statements in the minutes are the main reasons assigned for the disbarment. They are not sworn statements. Anyone who has ever been to the City Magistrates' Court of the City of New York knows that due to the tremendous volume of work, the confusion, the noise, the looseness of their proceedings, their records are suspect. These charges are "trivia." The proof that they were not inadvertent relates to four cases in which Unity Estates, Inc. was substituted for appellant's sister when pressure was being put on appellant's sister to stop appellant from attacking each procedure as unconstitutional. But no claim has been made in any of these four cases that a misrepresentation was made to any court even though Unity Estates, Inc. was substituted.

In the sixth charge, the claim that appellant made misstatements in the "inserted sheets" that were "unsigned"; this has been fully discussed.

In all the sustained charges, after the petition was presented and approved, proof of the charge is never introduced in evidence to prevent cross-examination.

POINT SIX

It has been shown that there is no legal competent evidence to support any charge: the charge on which appellant was disbarred is insignificant trivia blown up by the use of labels to justify a decision that had been long made to disbar appellant.

It must be remembered that appellant had never in 32 years of an active practice been accused of prior misconduct. In 32 years there had never been a prior inquiry. If all that could be found in 32 years is this trivia, it must lead to the inescapable conclusion and inference of a result reached and then a search for proof to justify the result.

An examination of recent cases shows that where an attorney had been convicted of serious misdemeanors (See, Matter of Switzer, 17 A.D. 2nd 589; Matter of Sullivan, 19 A.D. 2nd 625 (8); Matter of Subin, 17 A.D. 2nd 158; Matter of Buchbinder, 19 A.D. 2nd 117) they were either suspended for short periods of time or censured. There are many cases where attorneys are convicted of failing to file income tax returns or income tax frauds, there the penalty is a very short suspension (See, Matter of Costello, 21 A.D. 2nd 364; Matter of Friedman, 17 A.D. 2nd 644; Matter of Ward, 18 A.D. 2nd 15; Matter of O'Connor, 18 A.D. 2nd 19; Matter of Landis, 21 A.D. 2nd 488). There are many cases of filing false pleadings including false bills of particular; these are penalized by a short suspension (See, Matter of Ander, 22 A.D. 2nd 14; Matter of Kiley, 22 A.D. 2nd 527; Matter of Feldman, 17 A.D. 2nd 553. Attorneys who convert client's funds to their own use or co-mingle escrow funds were given suspension from 6 months

to two years in the following cases: Matter of Reape, 18 A.D. 2nd 132; Matter of Goba, 22 A.D. 2nd 789 (1); Matter of Buchbinder, 19 A.D. 2nd 117; Matter of Switzer, 17 A.D. 2nd 589.

CONCLUSION

It is respectfully submitted that there are important and substantial federal questions that should be decided in this case.

Respectfully submitted,

ARNOLD SCHILDHAUS
Attorney pro se

APPENDIX A –

OPINION OF APPELLATE DIVISION

First Department, November 1964

Bernard Botein, P.J.,
Benjamin J. Rabin,
Francis L. Valente,
Harold A. Stevens,
Samuel W. Eager, JJ.

----------x

In the Matter :

of :

Arnold Schildhaus, :

An Attorney :

----------x

Disciplinary proceedings instituted by The Association of the Bar of the City of New York. Respondent was admitted to the Bar on October 16, 1933, at a Term of the Appellate Division of the Supreme Court in the First Judicial Department.

John G. Bonomi (Michael Franck with him on the brief), attorney for petitioner

Arnold Schildhaus, attorney pro se

PER CURIAM:

The respondent was admitted to practice as an attorney and counsellor-at-law in this Department on October 16, 1933. This disciplinary proceeding was instituted against him under Section 90, subdivision 2, of the Judiciary Law. The matter was duly referred to a referee with direction to take testimony as to the charges and report thereon to this court. The referee, on the basis of a comprehensive and well reasoned report, concluded that Charges I, II and III, as alleged in the petition and amended petition were not sustained, but that Charges IV, V and VI, as alleged in the supplemental petition were duly established.

The referee's report is in all respects supported by the evidence. Respondent's several points attempting to attack the jurisdiction of this court and purporting to raise constitutional issues plainly lack merit and do not warrant discussion. The referee's report should be confirmed.

Charges IV and V were presented by a supplemental petition, filed November 29, 1962. They allege professional misconduct in material misrepresentations by the respondent to the New York City Magistrates' Courts in the course of two separate and independent prosecutions pending against him for violations of the Multiple Dwelling Law. It is alleged that the respondent falsely represented to the court that Unity Estates, Inc., a corporation, was the owner of the subject premises and that, on the basis of such representation and on respondent's application, the corporation was substituted in respondent's place as the party defendant.

It is further alleged that the respondent knew, or had reason to know, that his representations in each case with respect to ownership of the premises were false.

These charges were fully sustained by the evidence. In the prosecution pending against respondent in the City Magistrates' Court, Bronx, entitled People ex rel. Gerald Cogen v. Arnold Schildhaus, the respondent, on March 13, 1957, at a time for pleading, was asked by the court whether the subject houses were "owned by a corporation," and he replied "Yes, sir" and also stated that he wanted to substitute the corporation "Unity Estates, Inc." as the defendant in the prosecution. He further stated that he was authorized to plead for the corporation. The fact that Unity Estates, Inc. did not own the subject premises at the time of the alleged Multiple Dwelling Law violations was established by respondent's admissions and testimony in the proceedings here.

Also, in the prosecution pending against the respondent in the City Magistrates' Court, Bronx, entitled People ex rel. Frank Rossillo v. Arnold Schildhaus, the respondent, on August 2, 1957, made a motion in court "to substitute in place and stead of Arnold Schildhaus, the owner of the house, Unity Estates, Inc.," stating that he was appearing as attorney for said Unity Estates, Inc. He further said that he thought he was the president of the corporation and that "for the corporation, I am entering a plea of guilty." It was established, however, by the respondent's admissions and testimony before the referee that, at the time of the alleged Multiple Dwelling Law violations, Unity Estates, Inc. was not the owner of the subject premises.

The respondent's position here was that the representatives of the New York City Department of Housing and Buildings and the assistant corporation counsel in charge of the prosecutions understood that the particular corporation, Unity Estates, Inc., was not the owner; and that they had indicated that they did not care who was to be the defendant in each case, whether the actual owner or not. The referee rejected the respondent's testimony in this connection. Furthermore, as the referee found in the one case, "no arrangement respondent might make with the representatives of the Buildings Department and the Assistant Corporation Counsel, and irrespective of what respondent did or omitted to do to induce it, such arrangement could not furnish the slightest excuse for respondent's imposition on the Court * * *."

Charge VI, set forth in the supplemental petition, alleged that the respondent, in connection with three certain written applications to the Royal State Bank of New York for loans on behalf of certain corporations of which he represented himself to be the president, made false statements in writing concerning the financial condition, ownership, control and/or operation of the corporations. Two of the applications, bearing dates November 9, 1953 and January 1, 1955, were made in behalf of Unity Estates, Inc. and were signed "Unity Estates, Inc. by A. Schildhaus, [respondent] Pres.". The other application was one made in behalf of House Realty Corp., dated April 17, 1956, and signed "House Realty Corp. by H. A. Schildhaus, [respondent] Pres.". It was duly established that certain statements which were part of the respective applications when made and which were filled out in respondent's handwriting, contained material statements which were false and known to be false at the time when made, to wit:

(1) The statement in the loan application by Unity Estates, Inc., dated November 9, 1953, that "Emray & Unity Estates are 100% owned by A. Schildhaus," whereas in fact they were not so owned. Emray (Emray Realty Corp.) was another corporation in which respondent at one time had an interest.

(2) The respondent's subscription of the loan applications dated November 9, 1953 and January 1, 1955, as "Pres." of Unity Estates, Inc., whereas he was not then an officer of the corporation.

(3) The statement in the loan application dated April 17, 1956, that the title to certain apartment buildings therein mentioned was in House Realty Corp., whereas in fact the title to the premises at the time was otherwise held.

(4) Statements in the three applications that certain apartment buildings had stated net income for certain years, whereas it appears that the respective premises were being operated at a loss or, in any event, with an income return substantially less than that stated.

The charges of professional misconduct, sustained as against the respondent, are serious in nature. They demonstrate such a lack of professional and moral responsibility as to merit severe disciplinary action.

An attorney shall "strive at all times to uphold the honor and maintain the dignity of the profession." (Canon 29 of the Canons of Professional Ethics). The "conduct of the lawyer before the courts * * * should be characterized by candor and fairness." It is unprofessional for a lawyer as "an officer of the law charged * * * with the duty of aiding in the

administration of justice" to engage in practices having a tendency to mislead the court. (Canon 22 of the Canon of Professional Ethics.) An attorney is to be held strictly accountable for his statements or conduct which reasonably could have the effect of deceiving or misleading the court in the action to be taken in a matter pending before it. The court is entitled to rely upon the accuracy of any statement of a relevant fact unequivocally made by an attorney in the course of judicial proceedings. So, a deliberate misrepresentation by an attorney of material facts in open court constitutes serious professional misconduct. (See Matter of Rotwein, 20 A D 2d 428, 430. See, further, Drinker, Legal Ethics, p. 74; 7 C.J.S., Attorney and Client, § 23, p. 741.)

Here, it is clear that, as charged, the respondent "knew or had reason to know" that his representations to the court in the Multiple Dwelling Law prosecutions were false. The misrepresentations by the respondent with respect to the ownership of the subject premises were not inadvertent. They were made for the purpose of furnishing a basis on the record for the dropping of the respondent individually as a party defendant and the substitution of a corporate defendant to be charged with the convictions in his place. This was an imposition on the court and the respondent's motives are immaterial. It is no excuse in the one case that he did not want to involve his sister, who was an alleged owner of the subject premises, and that he wanted a "first offender" as a defendant. As found by the referee, this "merely makes matters worse by demonstrating that the imposition was deliberate and intentional, and not a mere inadvertence."

In addition to the foregoing instances of express misrepresentations in Magistrates' Court proceedings showing want of professional integrity on part of respondent, the evidence in support of Charge VI furnishes instances of lack of trustworthiness in ordinary business affairs. "While commercial activities are not forbidden a lawyer, he 'must see that his dealings as a business man are as upright as should be his dealings in his professional capacity' * * *." (Matter of Chartoff, 16 A D 2d 277, 280.) "'[I]t is well and abundantly settled that an attorney may be disciplined for misconduct even though such misconduct was outside of and not a part of his professional acts.'" (Matter of Wilcox, 243 App. Div. 103, 104; Matter of Dolphin, 240 N.Y. 89, 92-93.) The making of false representations to induce the extension of credit, as an example of commercial fraud, denotes moral turpitude. The misconduct of an attorney in this connection warrants disciplinary action for the protection of the public and the preservation of the reputation of the Bar. (Matter of Chartoff, supra; Matter of Relin, 19 A D 2d 460; Matter of Rotwein, supra; Matter of Spier, 269 App. Div. 1058; Matter of Isaacs, 172 App. Div. 181, 184; Matter of Alexander, 137 App. Div. 770.)

In determining the disciplinary measures to be adopted here, we have given due consideration to the attitude, conduct and testimony of the respondent in this proceeding. As demonstrated by the referee's report, the respondent's testimony was in many instances irresponsible, evasive and contradictory. The referee, in reviewing the evidence, had occasion in his report to state that the respondent's testimony in explanation of his misrepresentations in the Magistrates' Court proceedings, "is so fantastic that it

has to be read to be appreciated."; that respondent's testimony with reference to the loan application statements is "so preposterous that, in my opinion, it borders on an affront to the Court"; that respondent's arguments for inadmissibility of sheets inserted in the loan applications demonstrate a "woeful disregard of the obligation which rests upon every lawyer to act fairly and honorably, irrespective of whether it be by word of mouth or in writing, and if the latter, regardless of whether the writing be signed or unsigned"; and that the "effort to minimize the importance of the falsity in the statments [to the bank] furnished by respondent must be known to him to be as evasive as it is deceptive * * *."

The lawyer's function in the administration of justice requires a rigid adherence on his part to the aforesaid Canon 22 prescribing candor and fairness in all dealings with the court. The deliberate effort on the part of a lawyer to mislead the court in a material manner, whether by express misrepresentations, unfair and evasive tactics or other irresponsible means, has a tendency to obstruct justice; and there can be no justification for the same. The lawyer's duty of candor and fairness is not suspended for the purpose of making a defense to a disciplinary proceeding. "Where a member of the bar is charged with delinquencies, as in this case, there is but one course open to him -- to come forward frankly and make such truthful explanations as he may, and with equal frankness admit his mistakes. It does not profit him before this court to rely upon technical defenses or employ sophistry in argument in an attempt to establish a superficial justification." (Matter of Feinstein, 233 App. Div. 541, 542-543.) The candor and fairness, or lack thereof, of the attorney in his

testimony and conduct in such proceeding is a factor to be considered in fixing the appropriate sanction. (See Matter of Rotwein, supra.)

The charges, which were sustained, indicate that the respondent lacks the character and fitness requisite for an attorney at law in this State and such lack of character and fitness is confirmed by the respondent's testimony and conduct in these proceedings.

Quite appropriate here is the statement of Martin, P.J., in Matter of Kunstler (248 App. Div. 393, 400): "We are concerned here solely with the question of respondent's fitness to continue as a member of a profession which, as Lord Mansfield said in Ex Parte Brounsall (2 Cowp. 829), 'should stand free from all suspicion.' One of the requisites for admission to the bar is that the applicant be a person of good moral character. Membership may not be continued on a lower standard, the same condition must be maintained. Had it appeared at the time of respondent's application for admission to the bar that he had connived at thwarting the orderly administration of the law, had been heedless of the force of an oath to testify truthfully, indifferent to the truth and reckless to the point of dishonesty in financial statements, could we in justice to the public admit him to the bar? The answer is obvious."

The administration of the proper punishment "is not only justice to the profession itself, but it is a protection to the public which ought to be justified in its belief that any one holding a license to practice in the courts of this State is at least of good moral

character and fit to be intrusted with the duty of protecting the interests of others." (Matter of Ryan, 143 N.Y. 528, 531.)

On the basis of the evidence before the referee and on his report, and with due regard to respondent's testimony, he should be disbarred.

All concur except Stevens, J., who dissents and votes to suspend respondent for a period of two years.

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IN THE

Supreme Court of the United States

OCTOBER 1965 TERM

No. 732

In the Matter, of

ARNOLD SCHILDHAUS, An Attorney,

Appellant,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Appellee.

MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER 1965 TERM

No. .....

In the Matter of

ARNOLD SCHILDHAUS, An Attorney,

Appellant,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Appellee.

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee moves to dismiss the appeal in the above-entitled action on the ground that it does not present a substantial federal question.

Preliminary Statement

While appellee respectfully submits that the Jurisdictional Statement filed by appellant herein is on its face devoid of any substantial federal question, such questions as are set forth are predicated upon distortions of the record which appellant conspicuously fails to cite. In this regard, appellant's conduct is consistent with that which the Court below considered in disbarring him, see *infra*.

In order to clearly demonstrate the lack of any substantial federal question which appellant is so laboriously trying to obscure, a rather lengthy discussion of the facts as they appear in the record is necessary. For that purpose the argument in support of this motion to dismiss will be divided into four sections. Part I will consider the events which resulted in the inception of the disciplinary proceeding and the filing of the supplemental petition which contains the only charges which have been sustained and are before this Court. Part II will consider the misconduct upon which appellant's disbarment is predicated. Part III will deal with the transcript of two proceedings in the Magistrates Court of the City of New York (Pet. Exs. 11 and 12) upon which appellant predicates much of his argument. Finally, Part IV will consider the "bank statements" (Pet. Exs. 15, 16 and 17) which appellant contends were improperly admitted in evidence.

ARGUMENT

I.

The investigation of appellant's conduct and the filing of charges against him were properly conducted, appellant at all times being afforded a full opportunity to explain and defend his conduct, and no substantial federal question is presented thereby.

The essential facts to be discussed in this portion of appellee's brief are set forth, except where otherwise indicated, in a notice of motion, and supporting affidavit, dated October 3, 1964, requesting the permission of the Appellate Division, First Department, to amend the original petition; an affidavit by Michael Franck, Esq., of counsel for appellee, dated October 20, 1961, with respect to the same

motion; and in appellant's reply and cross motion to dismiss the proceeding and papers submitted therewith.

In the latter part of 1960, appellee's Committee on Grievances obtained from the clerks of the courts concerned certificates of conviction indicating that appellant had been convicted of a number of violations of the Multiple Dwelling Law and other statutes. On December 22, 1960, a letter was written to him requesting that he appear in the office of the Committee on Grievances on January 4, 1961, to discuss the matter. On December 27, 1960, appellant telephoned and stated that he could not appear on the date scheduled, due to the fact that he would be actively engaged in a trial. When advised of the nature of the matter to be discussed with him, he represented that all of his convictions for misdemeanors had been reversed. He was requested to forward by letter the citations of the decisions reversing his convictions and he agreed to do so.

On January 13, 1961, not having heard from him, a further letter was written to appellant requesting the citations which he had agreed to forward in the telephone conversation on December 27, 1960. No reply to this letter was received (papers later submitted by appellant in the course of the disciplinary proceeding admit that no reply was ever made). It therefore appeared that appellant was unable to substantiate his representations that his convictions had been reversed on appeal and, consequently, that they were untrue, particularly since certificates of his convictions were still being issued by the clerks of the courts (the evidence later adduced before the Referee indicates that many of the convictions against appellant were only on appeal at the time of these events and were, in fact, not reversed until after the hearings had been commenced).

Under the circumstances as they then existed, the investigation by appellee's Committee on Grievances indicating that appellant had been convicted numerous times, appellee's Executive Committee, following usual procedure in conviction cases, determined that the public interest required prompt action and authorized prosecution of a disciplinary proceeding against appellant without a formal hearing before the Committee on Grievances.

It should be noted that New York law does not require a hearing in advance of filing formal charges in the Appellate Division. The preliminary inquiry may take any number of forms, "Voluntary affidavits or even unsworn statements will often be enough . . ." *People Ex Rel. Karlin* v. *Culkin,* 248 N. Y. 465, 478. That is because the accused attorney must be given a full opportunity to defend himself before final action can be taken against him by the Court, Section 90 (6) of the Judiciary Law of the State of New York. In the instant case, the preliminary inquiry consisted of obtaining certificates of conviction, communication with appellant and his default in furnishing requested information which he had agreed to submit.

A petition alleging the convictions above referred to, returnable June 20, 1961, was served upon appellant on June 6, 1961. On June 19, 1961, appellant served his answer to the petition alleging, in substance, that most of the allegations in the petition were in error. On July 11, 1961, an order was entered appointing the Referee.

Upon receipt of appellant's answer to the petition, appellee inquired into the specific errors in the petition alleged therein. It was discovered that, in some respects, the certificates of conviction, supplied by the clerks of the courts, and upon which appellee had relied, were in error. In six (6) of the cases referred to in the petition, a corpora-

tion, Unity Estates, Inc., had been substituted by appellant as the defendant in his place. In furnishing certificates of conviction with respect to those cases, the clerks of the courts had obviously overlooked the substitutions and had certified the conviction of appellant, the previous defendant.

Appellee conducted an investigation of the circumstances surrounding the substitution of the corporation in appellant's place as defendant. It obtained information which indicated that the corporation was acting through appellant at the time of the violations for which it was convicted and, indeed, on the dates of the convictions themselves. Consequently, appellee moved to amend the petition previously served to correct the errors therein, particularly to set forth the convictions of the corporation and to allege that with respect to those appellant was still to be held responsible in view of the fact that the corporate acts which resulted in the conviction were directed by him. At the same time, inasmuch as some of the convictions were then on appeal, appellee requested that the hearings be adjourned until those appeals were finally determined.

Appellant cross-moved to dismiss the proceeding and, in any event, opposed a delay in the holding of hearings. The Appellate Division granted the motion to amend the petition and, in view of appellant's objections to any delay, ordered that hearings either be commenced immediately or the petition withdrawn. Pursuant to that order, appellee served an amended petition and proceeded to hold hearings thereon.

The petition, as amended, contained three charges. The first two set forth the convictions which, according to court records, were then outstanding against appellant. During the course of the hearings, many of the convictions were reversed on appeal. Two of them were nullified by writs

of habeas corpus obtained by appellant but not reflected in the court file. Consequently, only one of the convictions alleged in the first two charges was still outstanding at the time the Referee rendered his report. In view of that fact, he concluded that one single conviction was insufficient to constitute a basis for finding that appellant had been guilty of conduct tending to bring the profession into disrepute and he accordingly found the first two charges not sustained (Ref. Report, pp. 6-7).

The third charge of the petition, as amended, sets forth the convictions of the corporation and alleged that appellant was a stockholder, officer and employee and/or agent of the corporation and controlled and/or directed the actions upon which the convictions were predicated. Appellant's answer to that charge was a general denial.

In order to demonstrate appellant's connection with the corporation and the corporation's connection with the premises at which the violations were placed, appellee offered in evidence certified transcripts of the proceedings which took place when the corporation was substituted as defendant instead of appellant with respect to two of the convictions alleged in the third charge (M. pp. 93-8). The propriety of the admission in evidence of those transcripts (Pet. Exs. 11 and 12), and their significance, will be fully discussed at a later point in this brief, see III *infra*.

After appellee's case had been presented, appellant testified in his own defense. He testified that he was neither an officer, director or stockholder of the corporation which he substituted for himself as defendant (M. p. 183); that with respect to four of the convictions alleged [including the two with respect to which the minutes of the proceedings at the time of the substitution (Pet. Exs. 11 and 12)

had been offered in evidence], the corporation was not the actual owner of the premises involved which were then actually owned by appellant's sister (M. pp. 184-5); that at the time he substituted the corporation as defendant instead of himself, the corporation had nothing whatever to do with the premises (M. p. 194); and that he had intentionally substituted a corporation which was inactive (M. pp. 198-9). On cross-examination, appellant added that prior to these convictions, an effort had been made to withdraw the building involved from the rental market because they were operating at a loss (M. pp. 202-3).

In an effort to impeach that testimony by appellant which tended to absolve him of any connection with the premises at which the violations were placed and with the corporation which had been substituted in his place as defendant, appellee offered in evidence three financial statements (Pet. Exs. 15, 16 and 17) in appellant's own handwriting which he had submitted to a bank at various times during the period concerned (M. pp. 203-8). The propriety of the admission in evidence of these statements, and their significance, will be fully discussed at a later point in this brief, see IV *infra*.

This background demonstrates that the proceedings herein were instituted in reliance upon certificates of conviction furnished by the clerks of the various courts involved; that appellant was afforded an opportunity to set forth his explanation of these convictions against him; that he agreed to substantiate his claims; and that it was only after he had failed to do so that a disciplinary proceeding was instituted against him in which, as the record amply demonstrates, he was afforded a full opportunity to defend himself and to present such evidence as he deemed relevant.

II.

The charges of which appellant was found guilty, together with his conduct during the course of the hearings, amply warrant the discipline imposed and no substantial federal question is raised thereby.

We believe that this point is adequately substantiated by merely setting forth, without comment, the conduct for which appellant was disbarred.

Appellant was found guilty of making false representations to courts on two occasions. Specifically, it was found that in two cases in the Magistrates Court of the City of New York in which he personally was the defendant (one of which involved a misdemeanor), appellant had a corporation substituted in his place as defendant by falsely representing to the court that it was the owner of the premises at which the violations upon which the prosecution was predicated had been placed.

Appellant was also found guilty (Charge VI of the Supplemental Petition) of submitting to a bank, in connection with loan applications, three separate financial statements on behalf of corporations of which he represented himself to be the president falsely setting forth their financial condition, ownership, operations and/or control.

Finally, in determining the discipline to be imposed, the Court below considered "the attitude, conduct and testimony" of appellant in this proceeding (Opinion below, reprinted as part of appellant's Jurisdictional. Statement, pp. 35-6). Some of the occurrences in the course of the hearings below which reflect upon appellant's attitude, conduct and testimony are here set forth:

(1) Appellant testified that an officer of the bank to which he had submitted the financial statements on which the charge against him was predicated had advised him that he recalled that when the statements were submitted appellant had advised the bank not to rely on the information contained therein. When asked who this bank officer was, appellant stated that he had forgotten the name and would have to find out (M. p. 649). No bank officer was ever produced by appellant nor was this extremely-relevant point, if true, ever mentioned again.

(2) Appellant contended that the substitution by him of a corporation in his place and stead as defendant which had nothing to do with the premises had been specifically agreed upon with an Assistant Corporation Counsel. He identified this individual as Silas Lippman, Esq. Mr. Lippman, who had retired, was located by appellee and called as a witness. Instead of attempting to substantiate his claim, appellant cross-examined Mr. Lippman in an effort to show that he was not the Assistant Corporation Counsel who handled the cases in question (M. pp. 237-9). He thereupon concluded his cross-examination. When the Referee then asked counsel for appellee why Mr. Lippman had been produced if there was no showing that he was the Assistant Corporation Counsel who handled the particular cases involved, counsel pointed out that Mr. Lippman had been specifically identified by appellant as the Assistant Corporation Counsel with whom the agreement was made. Immediately after that statement was made, appellant resumed his cross-examination of Mr. Lippman and unsuccessfully tried to substantiate his claim that such an agreement had been made (M. pp. 240 ff.).

(3) Appellant testified in the course of the hearings that his numerous convictions had been the result of a con-

spiracy against him by various New York City officials; that the Magistrates had been told to convict him; and that they had admitted this to him (M. pp. 403-4).

On cross-examination, appellant was asked to identify the magistrates who made such admissions. Although he himself had offered this testimony, he first objected to the question as being immaterial. When that was overruled, he objected on the ground that the conversations between himself and the Magistrates were privileged communications (M. pp. 408-9). When that objection was also overruled, appellant simply refused to answer (M. p. 409).

In this connection, it should be noted that far from preventing appellant from showing that he was the victim of some alleged conspiracy as he claims, both appellee and the Referee went to extraordinary lengths to make certain that appellant received every opportunity. Thus, at the hearing on December 20, 1963, when it was anticipated that the matter would be completed and appellant had not yet furnished proof which he had represented at prior sessions he would obtain, both counsel for appellee and the Referee called appellant's attention to every such offer which he had up to then not yet substantiated (M. pp. 389-403). Similarly, at a later point (M. pp. 672-693) the Referee reviewed appellant's offer of proof (Resp. Ex. A) and specified that his refusal to accept the proof offered would be withdrawn if there was a showing that his allegations were part of a "conspiracy with the present proceeding" (M. p. 678). No such showing was, of course, ever made or even attempted.

III.

No substantial federal question is presented by the admission in evidence of the minutes of the proceeding in the Criminal Court wherein appellant substituted a corporation in his place as defendant inasmuch as no proper objection to their admission was made and, in any event, appellant later sought to introduce one of them in evidence himself.

The colloquy which took place when these minutes (Pet. Exs. 11 and 12) were offered in evidence (M. pp. 93-97) clearly demonstrates that the sole basis for appellant's objection thereto was his claim that they were incomplete, that is they did not reflect all that took place. Appellant so understood his own objection at the time it was made. Thus, when the second transcript (Pet. Ex. 12) was offered, he stated (M. p. 97):

> "I object to this on the same grounds, except that here we substituted the corporation first. The ground for my objection is that there were proceedings before which are not covered by these minutes. In other words, we had a trial here."

The claim that the minutes offered were incomplete rather than inaccurate might affect the weight to be given them but did not make them inadmissible and the objection was properly overruled. It might be noted parenthetically that the reason that the stenographer was not ultimately produced was because it was learned that he had retired and moved to California. Moreover, appellant, who later testified about the circumstances surrounding the substitution of the corporation in his place, never contended that

the Court which was asked to approve the substitution was ever apprised of the fact that the corporation had no connection with the premises at which the violations had been placed.

To the contrary, appellant clearly testified that he had arranged to substitute the corporation in his place as defendant, although it admittedly had nothing to do with the premises involved, with an Assistant Corporation Counsel and representative of the Buildings Department (all of whom he named and all of whom subsequently testified and denied appellant's assertions in this regard). Appellant stated that this agreement with these named individuals had been reached some months before the substitution was actually made (M. pp. 196, 198). He explained that he desired to substitute a corporation because he did not trust the Magistrates (M. pp. 372-3), thereby demonstrating not only that the Magistrates were never apprised of the true facts but that he intentionally misled them.

The record demonstrates, moreover, that appellant actually vouched for the accuracy of the minutes in the use he made of them during the hearing. Thus, as the Referee notes (Ref. Report, pp. 9-10), appellant sought to use one of the transcripts (Pet. Ex. 12) to substantiate a contention he was advancing.

Finally, far from disputing the accuracy of these transcripts at any point in the hearings, appellant himself offered one of them (Pet. Ex. 12) in evidence (M. p. 291).

IV.

No substantial federal question is raised by the admission in evidence of the "bank statements" inasmuch as the originals were submitted for appellant's inspection and, in any event, it is conceded that they are entirely in his own handwriting.

Charge VI of the supplemental petition is predicated upon the financial statements (Pet. Exs. 15, 16 and 17) used in cross-examining appellant in connection with testimony offered by him in defense of the charges contained in the amended petition under the circumstances set forth *supra*, Point I. These documents contradict appellant's sworn testimony in many respects. Thus, when they were first shown to him and admitted in evidence, appellant stated, with respect to the representations in his own handwriting contained therein, that "this wasn't quite correct" (M. p. 204); "it was not correct" (M. p. 204); "This is just a statement. This was a statement. None of these facts were correct. A search of the records would have shown that none of those facts were so" (M. p. 209); that insofar as his testimony differs from the "bank statements," the documents were incorrect (M. pp. 209-10, as corrected as M. pp. 219-24). These admissions that the "bank statements" were untrue were suspect at the time inasmuch as the documents contained information in appellant's own handwriting which supported the allegations of the then-pending charges. Nevertheless, an investigation was commenced and it was ascertained that the documents were, in fact, false. Charge VI was predicated upon that falsity.

Once the new charges were served upon him, appellant changed his testimony and claimed that the "bank state-

ments" were true. Thus, for example, the "statements" (Pet. Exs. 15, 16 and 17) cover the years 1952-1955. Throughout that period, according to the information contained in them, each of the buildings involved had thousands of dollars of annual income. When this claim of annual income was first called to his attention, appellant admitted that the buildings were in fact operating at a loss and that the "statements" to the contrary were incorrect (M. p. 210). Despite that admission appellant, after service upon him of the supplemental petition, contended that the "statements" were in all respects accurate, including the representations as to income. Yet, in direct contradiction to his latest claim, appellant had represented to the Court of Appeals of the State of New York (in a brief submitted by him in connection with a case decided November 23, 1955, and argued on October 14, 1955, *Emray Realty Corp.* v. *Abrams,* 309 N. Y. 888) that with respect to one of the buildings referred to in the "bank statements" (1) about two years ago [1953] the landlord had sought to withdraw the building from the rental market because it was losing money (M. p. 544); (2) even at the registered rents the building was losing money (M. p. 501); (3) the building will lose this year [1955] $9,278.66 (M. pp. 501-2); and (4) in two years the building has lost more than $25,000 (M. p. 502). When these representations to the Court of Appeals, which contradicted his then claim that the "bank statements" were accurate, were offered into the record, appellant objected as follows:

> "I object to any of this as merely argument before a Court of Appeals or anyplace, and not legal proof" (M. p. 502).

It is precisely because the proof in the record so thoroughly established the falsity of the documents submitted by appellant to the bank that he sought to have them excluded on the ground that they had somehow been "smuggled" into evidence by appellee. Thus, it is impossible to reconcile the claim by appellant that appellee resorted to subterfuge to put the "bank statements" in evidence with his admission that they are entirely in his handwriting and with his claim that they are in all respects accurate. Nevertheless, that is appellant's contention.

In substance, appellant contends that the manner in which these exhibits (Pet. Exs. 15, 16 and 17) were put together and the fact that they were photostats substantiates his claim of impropriety. As indicated in the affidavit submitted in opposition to appellant's motion to the Referee to strike these exhibits, the middle sheet of each, which is the "disputed" sheet, was placed there because that is where it was kept in the originals which are part of the bank's files. In any event, appellee, far from attempting to conceal anything as alleged by appellant, produced the bank officer at the hearing before the Referee on November 19, 1963, together with his file which contained the originals of the exhibits. As the record discloses, appellant asked for and was given at least one of these originals which he examined (M. p. 344). The record further discloses that at the same hearing the bank officer testified, in response to appellant's question, that the "disputed" page of each exhibit supplemented the remaining pages (M. p. 340); is required by the bank (M. p. 341); and is usually submitted at the same time (M. p. 344). Thus, at that hearing, appellant had available all the information on the basis of which he subsequently challenged the accuracy and validity of these exhibits. Nevertheless,

he did not raise the point until after the hearing held March 20, 1964, although in the intervening period hearings were held on December 20, 1963, and January 10, 1964 (and the hearings were closed), more than one month after he had been served with appellee's brief to the Referee in which the full significance of these exhibits was set forth. Appellant had clearly reached the point where he would make whatever claim came to mind, regardless of the evidence in the record.

In his desperate efforts to extricate himself, appellant contended that even though the "bank statements" were in his own handwriting and had been furnished by him to the bank, they could not be used by the bank in any action against him inasmuch as they were not signed and therefore unenforceable under the Statute of Frauds, the Parol Evidence Rule, etc. For the same reason, appellant argued the Court below could not consider them in the context of the disciplinary proceedings against him. These technical defenses were properly rejected by the Court below in these words (Opinion below, reprinted as appendix to appellant's Jurisdictional Statement, p. 36):

> "The Lawyer's duty of candor and fairness is not suspended for the purpose of making a defense to a disciplinary proceeding. 'Where a member of the Bar is charged with delinquencies, as in this case, there is but one course open to him—to come forward frankly and make such truthful explanations as he may, and with equal frankness admit his mistakes. It does not profit him before this court to rely upon technical defenses or employ sophistry in argument in attempts to establish a superficial justification' (*Matter of Feinstein*, 233 App. Div. 541, 542-3)."

CONCLUSION

We respectfully submit, therefore, that the appeal should be dismissed because no substantial federal question has been presented.

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The Association of the Bar
of the City of New York

MICHAEL FRANCK
Of Counsel

November 10, 1965.

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In The

United States Supreme Court

October 1965 Term

No. 732

In the Matter of
ARNOLD SCHILDHAUS, an Attorney,

Appellant,

v.

THE ASSOCIATION OF THE BAR OF
THE CITY OF NEW YORK,

Appellee,

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

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New York • Philadelphia • Newark • New Brunswick

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In The

SUPREME COURT OF THE UNITED STATES

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In the Matter of
ARNOLD SCHILDHAUS, an Attorney,

Appellant,

v.

THE ASSOCIATION OF THE BAR OF
THE CITY OF NEW YORK,

Appellee.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Appellant, answering the motion to dismiss, respectfully submits this memorandum to clarify the issues presented in this appeal.

Point I

The petitions presented to the appellate division were perjured.

Perjury is defined by New York law (Section 1628, New York Penal Law) as: "an unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false."

In its motion papers, appellee acknowledges the actual receipt of notice that the convictions had been reversed (p. 3 of appellee's motion)§ Appellant claims repeated notice. Repeated notice there was. The reports of the Court of Appeals, the Appellate Division, the Supreme Court and New York Supp. show the following list of convictions reversed or writs of habeas corpus sustained before appellee swore to its first petition in May, 1961. Each of the citations listed relate to alleged convictions set forth in the first petition and sworn to by officers of appellee as existing at the time of the swearing.

In Schildhaus v. City of New York, 10 A.D.2nd 566 (Jan. 1960) a judgment was affirmed for false imprisonment resulting from the sustaining of writs of habeas corpus which by New York law made the convictions a nullity (People v. Schildhaus, 8 N.Y.2nd 33; May 1960). The convictions were sworn to in appellee's petition as outstanding.

Schildhaus v. City of New York, 8 N.Y. 2nd 1108 (Nov. 1960) is the affirmance of the false arrest judgment by the Court of Appeals.

Schildhaus v. City of New York, 7 Misc. 2nd 859 (May 1957) is a long opinion giving the reasons for the judgment for false imprisonment.

Schildhaus v. Justices of Court of Special Sessions, 16 Misc. 2nd 675 (1959) and People ex rel Schildhaus v. Dros, 14 Misc. 2d 126 (1960) dealt with convictions reversed as a result of the decision of the Court of Appeals in People v. Schildhaus, 8 N.Y.2d 33 (1960) which is a leading case in New York. All the convictions are sworn to be appellee as outstanding at the time appellee swore to the first petition.

People ex rel Siegal on behalf of Schildhaus v. Dros. 185 N.Y. Supp. 2nd 21 (1959) dealt with a conviction made invalid when the writ of habeas corpus was sustained (People v. Schildhaus, 8 N.Y. 2nd 33; People ex rel Schildhaus v. Dros, 11 N.Y. 2nd 167). Appellee swore to the convictions as outstanding.

People v. Schildhaus, 186 N.Y. Supp. 2nd 68 (1959) dealt with a conviction that had been reversed and a new trial ordered even though a writ of habeas corpus had been sustained. This was before People v. Schildhaus, 8 N.Y. 2nd 33 made it the law that a sustained writ made the underlying conviction a nullity. Appellee listed the one conviction twice under its old number and the new number it received for the new trial. It swore both convictions were valid and subsisting at the time it swore to the petition.

People v. Schildhaus, 10 Misc. 2nd 64 (1958) dealt with three convictions that had been reversed and new trials ordered. A demurrer to the informations was sustained. They are sworn to in appellee's petition.

To list all the litigation would be fruitless. Abbott's Digest lists many more. Moreover as appellee's own exhibits submitted to this Court show; six of the convictions sworn to by appellee were by their own records false.

Appellee does not deny that the publicity given these cases was tremendous. Press, radio and television gave the public a blow by blow description of the fight between appellant and City Hall. Appellant does not deny that the second petition was sworn to after repeated notice that 13 of its 14 allegations were false (p. 4-5 of appellee's motion; p. 15 jurisdictional statement). Appellee's claim that most of the

convictions were reversed after the petitions were filed. The record shows only three were so reversed after the petitions were filed.

Point II

A preliminary inquiry is required by New York law.

To the discussion on page 24 of the jurisdictional statement, appellant would add only the following. Even if appellee's statement that a perjured petition is enough to justify the disbarment trial of an attorney were true; the petitions assuming arguendo that they were not perjured alleged only offenses and misdemeanors. By New York law, only those convictions of misdemeanors which involve moral turpitude can serve as the basis for disbarment Matter of Zanger, 266 N.Y. 165; Matter of Roosevelt, 232 A.D. 23, 25). Since appellee's first two petitions did not allege or even imply moral turpitude, a preliminary inquiry was mandatory. To put it in other words, the petitions even if not perjured did not state a cause of action.

Point III

The purpose of the perjured petitions and the failure to hold a preliminary inquiry was a Cohen v. Hurley inquisition.

This Court is respectfully referred to pages 13 to 16 of the jurisdictional statement; particularly the sworn affidavit of Mr. Franck, of counsel for appellee, quoted on the bottom of page 15 of the jurisdictional statement.

Point IV

Appellee misstates the facts when it states that the basis of appellant's objection was that the minutes of the substitution were incomplete rather than inaccurate.

On pages 93 and 94 of the stenographic minutes of the hearing before the Referee, the following colloquy took place:

> The Referee: Do you question the fact, Mr. Schildhaus, that if the stenographer were called he would testify that it is a correct transcript.
>
> Mr. Schildhaus: I do sir.
>
> The Referee: Despite the fact that it is certified.
>
> Mr. Schildhaus: Yes, sir. I had a conversation with Mr. Nargi (the stenographer) and Mr. Nargi --
>
> The Referee (interrupting): I will receive the document.

By the code of criminal procedure of the State of New York, section 221 b, without proof of the certification by the stenographer and by the justice of magistrate who held the examination, the minutes were not admissible (People v. Qualey, 210 N.Y. 202).

Point V

Exhibits were fraudulently manufactured by appellee in an elaborate and intricate fraud.

Appellee claims that there was no fraud in the elaborate fraud described in the jurisdictional state-

ment (pages 18-19) because all the papers were in appellant's handwriting (p. 13 of appellee's brief). The appellee calls the 12 inserted sheets the "disputed" "sheet" (the quotes around "disputed" are appellee's). The Appellate Division, in its opinion concedes that there were "sheets inserted in the loan applications." All of the 12 inserted sheets were undated, incomplete and unsigned.

To prevent appellant from cross-examination and to prevent the appellant from examining the originals, the originals were never introduced in evidence. To prevent examination of the fraudulent photo copies (Exhibits 15, 16 and 17) appellant was put on a merry-go-round. Whomever he went to, did not have the exhibits.

Inserted in the loan application of one corporation was the unsigned, incomplete and undated sheet of paper of another corporation, Emray Realty Corp. It was so inserted that unless you had a great deal of time to study it, it defied detection that this was not part of a signed application for a loan. Unless these "inserted sheets" were signed, the Statute of Frauds, the Parol Evidence Rule, the law of contracts and the Banking Law of the State of New York would have forbidden interrogation as to these unsigned pieces of paper; and appellee could not make the argument it makes to this Court which is printed on page 14 of its motion papers.

Without cross-examination and without seeing the exhibits, it was impossible from May 21, 1962 when the photocopies were introduced in evidence until November 19, 1963 when appellant was given a momentary glimpse and discovered the fraud. To prevent cross-examination and the discovery of the fraud after appellee's petition was approved by the

Appellate Division as Charge VI, neither the photo copies or the originals were introduced in evidence.

Why? Besides attempting to prevent the discovery of the fraud that the inserted papers were inserted and unsigned, it was important to prevent the discovery that the inserted papers were not made at the same time as the applications for the loans, If this Court will examine Exhibit 16 in evidence, it will be seen that the corporation applying for the loan is Unity Estates, Inc. and the application is to and on a form of the Royal State Bank. While the unsigned and undated papers inserted in the middle of the application for a loan are of Emray Realty Corp. and the lender and the form used is of Royal Industrial Bank. On June 1, 1954, the Royal Industrial Bank had become the Royal State Bank. The Emray paper was consequently made a long time before the Unity paper was made and signed.

Appellee does not deny the fraud but echoes the Appellate Division which called these frauds "a technical defense" and "sophistry" to establish a superficial justification. This Court is respectfully referred to pages 17 to 22 of the jurisdictional statement for a full discussion of the frauds.

Point VI

Appellee does not deny that appellant was denied confrontation and cross-examination, or that procedures described on page 21 and 26 of the jurisdictional statement are true and accurate.

Respectfully submitted,

Arnold Schildhaus

END